

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

OLYMPIA MASTER BUILDERS, THURSTON
COUNTY CHAMBER OF COMMERCE,
HINKLE PROPERTIES, INC. d/b/a HINKLE
HOMES,

Petitioners,

v.

THURSTON COUNTY,

Respondent.

Case No. 15-2-0002

ORDER DENYING MOTION TO DISMISS

This matter comes before the Board pursuant to the Respondent Thurston County's Motion to Dismiss.¹ The County argues the Board lacks jurisdiction to consider this matter due to Petitioners' failure to comply with our RCW 36.70A.290(2). That is, Petitioners' Petition for Review (PFR) was not filed within 60 days of the County's action.² The County's motion is denied.

I. FACTS AND ANALYSIS

Petitioners have asserted eight issues, all of which relate to what they contend involve *de facto* amendments of County development regulations, specifically, the Critical

¹ Respondent Thurston County's Motion to Dismiss Petition for Lack of Timeliness, filed January 19, 2016.

² RCW 36.70A.290 (2), in part (emphasis added): All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication as provided in (a) through (c) of this subsection.

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

Except as provided in (c) of this subsection, for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

1 Areas Ordinance (CAO). The challenged County "action" involves the development permit
2 review process regarding potential impacts to Mazama pocket gopher habitat, and which is
3 referred to as the "interim permitting process" (Interim Process). Mazama pocket gophers
4 are a species listed as "threatened" under the Endangered Species Act.³ Petitioners allege
5 that, without legal notice, public participation, hearings, or adoption of a resolution or
6 ordinance, the County approved the Interim Process and has used it to identify and regulate
7 development of property containing actual or potential Mazama pocket gopher habitat,
8 resulting in a *de facto* development regulation amendment.
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10 The Board assumes solely for purposes of this order that the County action
11 constitutes a *de facto* amendment.⁴ The question posed by the County is whether the
12 Petitioners failed to file their PFR within the 60 day jurisdictional window of RCW
13 36.70A.290(2). It is the County's position that Petitioners filed at least 166 days from
14 "publication", far beyond the 60 day time limit. The RCW 36.70A.290(2) trigger is
15 "publication" of a notice that a County has adopted a comprehensive plan or development
16 regulations or amendments of same. In its motion, the County sets forth extensive publicity
17 regarding the Interim Process, including County press releases, newspaper and magazine
18 articles, and blog posts.⁵ Some of the publicity clearly indicates that at least some of the
19 petitioners were aware of application of the Interim process. It is the County's position that
20 the extensive publicity sufficed to achieve compliance with the RCW 36.70A.290(2)
21 publication requirement.⁶
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25 ³ 16 USCS 1531 *et seq.*

26 ⁴ The County's motion to dismiss is akin to a summary judgment motion. The Board will consider the facts and
27 reasonable inferences from the facts in a light most favorable to the Petitioners. *Hertog v. City of Seattle*, 138
28 Wn.2d 265, 275 (1999) (citing *Taggart v. State*, 118 Wn. 2d 195, 199. A decision on the ultimate question,
29 whether or not the County's action amounts to a *de facto* amendment, will only be rendered following full
30 briefing and oral argument at a Hearing on the Merits.

31 ⁵ Respondent Thurston County's Motion to Dismiss Petition for Lack of Timeliness, filed January 19, 2016,
32 pps. 5-6.

⁶ "The basic nature and accusation of Petitioners in this case is that a "de facto" amendment of the CAO
occurred since nothing was published or otherwise made known by the County prior to implementation. It is
readily apparent from the Index that this was not the case. Local news agencies provided the public more than
adequate notice of the review changes based upon the significant response to the June 11, 2015 press
release/publication from Thurston County. Indeed counsel for the Petitioners and one of the Petitioners relied
on that June 11, 2015 publication to advise interested parties of the County's actions." *Id.* p. 6.

1 The Petitioners argue that the County failed to adopt amendments to its development
2 regulations and, even if one assumes that it did, that the County failed to follow the
3 applicable publication requirements.

4 The 60-day appeal period applies only to "adopted" comprehensive plan or
5 development regulation amendments and only begins to run following "publication" of notice
6 of the jurisdiction's action. In this instance, it is not clear that the County "adopted" any
7 amendments. The CAO, and any amendments of same, constitute development regulations.
8 Development regulations are defined by RCW 36.70A.030(7):
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10 "Development regulations" or "regulation" means the controls placed on
11 development or land use activities by a county or city, including, but not
12 limited to, zoning ordinances, critical areas ordinances, shoreline master
13 programs, official controls, planned unit development ordinances, subdivision
14 ordinances, and binding site plan ordinances together with any amendments
15 thereto. A development regulation does not include a decision to approve a
16 project permit application, as defined in RCW 36.70B.020, even though the
17 decision may be expressed in a resolution or ordinance of the legislative body
18 of the county or city. (emphasis added)

19 The record fails to disclose the adoption of any ordinances amending the County's CAO, its
20 critical areas ordinance.⁷

21 Furthermore, even if the County could be seen to have taken an "action" to amend
22 the CAO, it failed to comply with the applicable publication requirements. As the Board has
23 held, the 60-day limitation period for filing a Petition for Review does not start until a notice
24 of adoption has been published by the local government. "A county may not prevent filing of
25 a challenge to an ordinance by a failure to publish the required notice. Nonetheless, until the
26 publication takes place the sixty day period does not begin to run."⁸

27 RCW 36.70A.290 provides no specific guidance as to what might constitute sufficient
28 "publication" of notice of an ordinance's final adoption. Counties are required to "publish a
29 notice", petitions for review must be filed within 60 days "after publication", and "the date of
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31 ⁷ RCW 36.32.120 The legislative authorities of the several counties shall: (7) Make and enforce, by
32 appropriate resolutions or ordinances, all such police and sanitary regulations as are not in conflict with state
law

⁸ *Port Townsend v. Jefferson County*, Case No. 94-2-0006, Final Decision and Order, August 10, 1994, p. 3.

1 publication for a county shall be the date the county publishes the notice that it has adopted"
2 [a plan, development regulations, or amendments]. Neither does WAC 242-03-030(16) add
3 any clarification as it merely rephrases RCW 36.70A.290.⁹

4 There are two instances in which the GMA requires that "notice" be provided: when
5 the jurisdiction is considering action, RCW 36.70A.035 (pre-action), and following the taking
6 of final action, RCW 36.70A.290 (post-action). Although RCW 36.70A.290 lacks guidance
7 regarding post-action publication requirements, the purpose of the requirement is clear.
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9 The purpose of requiring publication before an ordinance is adopted is to
10 afford an opportunity to parties-in-interest and citizens to be heard on the
11 subject matter and content of the ordinance while the purpose of publication
12 after the passage of an ordinance is to afford the chance to have the
13 ordinance judicially reviewed. *King County v. Farr*, 7 Wn. App. 600, 608
14 (Wash. Ct. App. 1972), citing *Bruno v. Shrewsbury*, 2 N.J. Super. 550, 65
A.2d 131 (1949). (emphasis added)

15 The Board has made the same observation:

16 In this instance, the purpose of RCW 36.70A.290(2), in addition to informing
17 the public that an ordinance had been adopted, is to provide notice of the
18 adoption of the ordinance so that a specific date is triggered from which an
19 appeal to a growth planning hearings board can be made. *Gutschmidt v. City*
20 *of Mercer Island*, GMHB Case No. 92-3-0006, p. 28, 1993 GMHB LEXIS 55,
p. 66. (emphasis added)

21 The Washington State Attorney General issued an opinion (AGO) in the early years
22 of the GMA which addressed the type of post-action notice required by RCW 36.70A.290(2).
23 While an AGO is persuasive, it is not binding.¹⁰
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26 ⁹ (16) "Publication" means:

27 (a) For a city, the date the city publishes the ordinance or summary of the ordinance adopting a
28 comprehensive plan, development regulations or subsequent amendment, as is required to be published, or
29 the date the department of ecology publishes notice that the shoreline master program or amendment has
30 been approved or disapproved by final action of the department of ecology;
31 (b) For a county, the date the county publishes the notice that it has adopted a comprehensive plan,
32 department of ecology publishes notice that the shoreline master program or amendment has been approved
or disapproved by final action of the department of ecology.

¹⁰ *Pub. Hosp. Dist. No. 1 of King County v. Univ. of Wash.*, 182 Wn. App. 34, 44. (2014); *Thurston County v. City of Olympia*, 151 Wn.2d 171, 177, (2004).

1 RCW 36.70A.290 establishes the filing date for petitions before the Boards.
2 Such petitions must be filed within 60 days of the date cities and counties
3 publish notice of the adoption of comprehensive plans or development
4 regulations. This section does not specify the form of the publication. Thus,
5 the general city and county procedures for publication of ordinances and
6 resolutions would govern. Cities are required to publish ordinances, or
7 summaries thereof, in their official newspapers. RCW 35.21.180, 35.22.288,
8 35.23.310, 35.24.220, 35.27.300, 35.30.018, 35A.12.160. Similarly, counties
9 are required to publish notices in their official newspapers. RCW
10 36.32.120(7).¹¹ 1992 Wash. AG LEXIS 89, *20-21; 1992 Op. Atty Gen. Wash.
11 No. 23. (emphasis added)

12 In addition, the Board notes chapter 65.16 RCW which also specifically addresses
13 publication requirements applicable to counties.

14 RCW 65.16.030

15 Affidavit of publication—Presumption.

16 All legal and other official notices shall be published in a legal newspaper as
17 herein defined, and the affidavit of publication shall state that the newspaper
18 has been approved as a legal newspaper by order of the superior court of the
19 county in which it is published, and shall be prima facie evidence of that fact.
20 Wherever a legal notice, publication, advertisement or other official notice is
21 required to be published by any statute or law of the state of Washington, the
22 proof of such publication shall be the affidavit of the printer, publisher,
23 foreman, principal clerk or business manager of the newspaper which
24 published said notice. (emphasis added)

25 RCW 65.16.130

26 Publication of official notices by radio or television—Restrictions:

27 Any official of the state or any of its political subdivisions who is required by
28 law to publish any notice required by law may supplement publication thereof
29 by radio or television broadcast or both when, in his or her judgment, the
30 public interest will be served thereby . . . (emphasis added)

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32 ¹¹ Interestingly, the post-action notice provisions of RCW 36.70A.290 related to cities uses the phrase "as is required to be published". RCW 36.70A.290(2)(a). RCW 36.70A.290(2)(b), in referring to counties, fails to include that clause.

1 RCW 65.16.160

2 Publication of ordinances:

3 (1) Whenever any county is required by law to publish legal notices
4 containing the full text of any proposed or adopted ordinance in a newspaper,
5 the county may publish a summary of the ordinance which summary shall be
6 approved by the governing body and which shall include:

7 (a) The name of the county;

8 (b) The formal identification or citation number of the ordinance;

9 (c) A descriptive title;

10 (d) A section-by-section summary;

11 (e) Any other information which the county finds is necessary to provide a
12 complete summary; and

13 (f) A statement that the full text will be mailed upon request.

14 . . .

15 (3) The full text of any ordinance which is summarized by publication under
16 this section shall be mailed without charge to any person who requests the
17 text from the adopting county

18 The Board finds the cited Attorney General's Opinion persuasive: RCW
19 36.70A.290(2) requires that counties must publish notices of final-action (i.e. ordinances
20 amending comprehensive plans or development regulations) as required by applicable state
21 law.¹² In this instance, chapter 65.16 RCW establishes publication requirements for
22 ordinances adopted by counties. In reaching that conclusion, the Board acknowledges it
23 lacks jurisdiction to determine compliance with that chapter. In this instance it bases its
24 conclusion on a failure to comply with RCW 36.70A.290(2).¹³

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30 ¹² The Board's conclusion is in accord with the Board's statement in *Diehl v. Mason County*, Case No. 95-2-
31 0073, Amended MO, (October 10, 1995): "The failure of a local government to publish notice of adoption
32 precludes the 60-day appeal limitation from starting. A formal publication rather than extensive newspaper
coverage and general public knowledge must be made." (emphasis added)

¹³ See *Cave and Cowan v. City of Renton*, Case No. 07-3-0012, Order on Motion for Reconsideration, May
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